Supreme Court, U.S.
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No. 99-348

In The

Supreme Court of the United States

LARRY D. KIEL,

Petitioner,

v.

H.N. "SONNY" SCOTT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

1. Does the failure of a State to adopt a mailbox rule similar to that mandated in the federal courts by *Houston v. Lack* implicate any Constitutional concerns?

LIST OF PARTIES

1. Petitioner: Larry D. Kiel, # 208518, Joseph Harp Correctional Center, P.O. Box 548, Lexington, OK 73051

2. Respondent: H.N. "Sonny" Scott, Warden, Joseph Harp Correctional Center, P.O. Box 548, Lexington, OK 73051-0548

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OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals, Emergency Appellate Division in *Kiel v. State*, F-92-608 is unpublished. The opinion by the Court of Criminal Appeals denying review of F-92-608 is unpublished. The opinion of the Oklahoma Court of Criminal Appeals in the appeal of the denial of post-conviction relief in *Kiel v. State*, PC-97-893 is unpublished. The opinion of the United States District Court for the Western District of Oklahoma in *Kiel v. Scott*, CIV-97-1737-C is unpublished. The opinion of the United States Court of Appeals for the Tenth Circuit in *Kiel v. Scott*, 98-6208 is unpublished.

BASIS OF JURISDICTION

The Court has jurisdiction to determine whether a writ of certiorari should be granted pursuant to 28 U.S.C. § 1254.[1]

The Judgment below was entered on February 18, 1999, and rehearing was denied on March 10, 1999. An extension of time to file the "Brief in Opposition" was granted by letter dated November 16, 1999.

[1] The petitioner accidentally mis-cited the relevant statute as 29 U.S.C. § 1254 (emphasis added).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE[2]

1. United States Constitution, Article III, § 2
2. OKL. CONST. art. VII, § 1
3. OKL. CONST. art. VII, § 4
4. Rules of the Oklahoma Supreme Court, 1997, Rule 1.1(B)
5. Rules of the Oklahoma Court of Criminal Appeals, 1997, Rule 1.0
6. Rules of the Oklahoma Court of Criminal Appeals, 1997, Rule 5.2(A) (1997)
7. Rules of the Oklahoma Court of Criminal Appeals, 1997, Rule 5.2(C) (1997)
8. Oklahoma Statutes, OKLA. STAT. tit. § 12, 990A(B) (1997)
9. Oklahoma Statutes, OKLA. STAT. tit. 22, § 1051(B) (1991)

STATEMENT OF THE CASE

The petitioner, Larry D. Kiel (hereinafter petitioner), a prisoner in the custody of the State of Oklahoma, has brought the instant petition for writ of certiorari. The petitioner was convicted in Oklahoma County case number CF 91-2683 with Trafficking in Illegal Drugs (Count I); Possession of Controlled Dangerous Substance with Intent to Distribute (Count II); Possession of Drug Paraphernalia (Count III); Possession of Controlled Dangerous Substance without a Tax Stamp (Count IV), and

[2] The text of these statues is contained in the appendix.

Maintaining a Vehicle where Controlled Dangerous Substance is Kept (Count VI). Each of these convictions was after former conviction of two or more felonies. The petitioner was sentenced on January 10, 1992 to one thousand (1000) years on Counts I and II, two hundred and fifty (250) years on Counts IV and VI and one year on Count III, all the sentences to run consecutively.

The petitioner filed an appeal in the Oklahoma Court of Criminal Appeals. This case was heard by the Criminal Appeals Emergency Appellate Division, which affirmed his convictions on June 9, 1995. A petition for rehearing was denied by the panel on March 26, 1996. The petitioner then filed a "Petition for Review" with the Court of Criminal Appeals. This was denied on May 1, 1996.

On April 16, 1997, the petitioner filed an application for post-conviction relief in the State district court. This was denied on May 21, 1997. On June 23, 1997, the petitioner filed a "Petition in Error" in the Court of Criminal Appeals, appealing the denial of his post-conviction application. On September 8, 1997, the Court of Criminal Appeals declined appellate jurisdiction and dismissed the appeal based on his failure to timely file his appeal.

On October 29, 1997, the petitioner filed an application for habeas corpus in the United States District Court for the Western District of Oklahoma. This was denied on April 30, 1998, based on his failure to file his habeas claim within the one year statute of limitations set forth in 28 U.S.C. § 2244(d)(1). (Appendix to Petition at 25A-27A). The petitioner appealed to the United States Court of Appeals for the Tenth Circuit, which denied his appeal on

February 18, 1999. (Appendix to Petition at 1A-10A). The petitioner then filed a petition for rehearing, which was denied on March 10, 1999. (Appendix to Petition at 29A).

ARGUMENT

THE FAILURE TO ADOPT A "MAILBOX RULE" IN STATE COURTS DOES NOT IMPLICATE ANY FEDERAL CONSTITUTIONAL CONCERNS. ACCORDINGLY, THE PETITION FOR CERTIORARI SHOULD BE DENIED.

In the instant case, the issue is whether the State of Oklahoma is constitutionally required to adopt a "mailbox rule" that allows an inmate's pleadings that are filed in State court to be deemed filed when they are delivered to prison officials to be mailed. The petitioner in the instant case failed to timely file a post-conviction appeal in the State courts, resulting in the State courts not having jurisdiction of his appeal. His subsequent federal habeas petition was then dismissed because he failed to timely file it within the one year statute of limitations required by 28 U.S.C. § 2244(d)(1). If the Court grants the petitioner the relief he requests, his state post-conviction appeal will be deemed timely filed and toll the statute of limitations sufficiently to allow his federal habeas petition to be heard. *See* "Appendix to Petition" at 5A, 16A-21A. The Respondent believes that this relief is unwarranted by the Constitution, and that granting a writ of certiorari is accordingly inappropriate.

Supreme Court Rule 10 states that the Court will grant certiorari if there is a split among United States

courts of appeals, or if its decision is "so far departed from the accepted . . . course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." SUP.CT.R. 10(a). The Court also grants the writ if a State court has decided "an important federal question" in a way that conflicts with another State court or United States court of appeals. SUP.CT.R. 10(b). Finally, the Court will review if the question is an important question of "federal law" that "has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP.CT.R. 10(c). None of these criteria apply in the instant case.

The petitioner fails to cite to any cases that demonstrate a split of authority among United States Courts of Appeals on requiring State courts to adopt the mailbox rule. Likewise, the undersigned attorney is unaware of any such cases. Consequently, the petitioner is unable to rely on either the split in authority or the supervisory powers clause of Rule 10(a) to justify the granting of the writ. He accordingly must rely on classifying this question as a federal question in order to fall under the provisions of Rule 10(b) or (c) in order to justify the granting of the writ. Alternatively, he must demonstrate both a federal question and a conflict with another State court in the interpretation of the federal question. SUP.CT.R. 10(b). He is unable to demonstrate that the mailbox rule is a constitutionally mandated, federal issue. Accordingly, he is unable to demonstrate that a writ of certiorari should be granted.

The petitioner attempts to show that this is a federal question by arguing that the United States Constitution

requires State courts applying State rules to appeals in that State court to apply the "mailbox rule" of *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) to the State appeals. (Petition at 11-12). This argument fails because *Houston* was not based on the Constitution, but on interpretation of the Federal Rules of Appellate procedure. *Jenkins v. Burtzloff*, 69 F.3d 460, 461 (10th Cir. 1995). Accordingly, there is no constitutional basis for this argument.

To assist the Court in determining the issue before it, the Respondent will provide a brief introduction to the Oklahoma Court system and its rules. Oklahoma's Constitution provides for two court systems of last resort: the Oklahoma Supreme Court and the Oklahoma Court of Criminal Appeals. OKL. CONST. art. VII, § 1. The Oklahoma Supreme Court has jurisdiction over civil cases and the Oklahoma Court of Criminal Appeals has "exclusive appellate jurisdiction in criminal cases." OKL. CONST. art. VII, § 4. *See also Banks v. State*, 953 P.2d 344, 345 (Okla.Crim.App. 1998). Each of these courts has its own rules of procedure. *See generally* OKL. SUP. CT. R. 1.1(b); OKL.CT.CRIM. APP. R. 1.0(A) (1997) (amended 1998).[3] The rules of the Court of Criminal Appeals have the force of statute. OKLA. STAT. tit. 22, § 1051(B) (1991). The Oklahoma Court of Criminal Appeals requires that an appeal from the denial of a post-conviction application be filed in that court within thirty (30) days. OKL.CT.CRIM. APP. R. 5.2(C)(1) (1997) (amended 1998). The failure to timely file

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[3] The Court rules that are cited will refer to the versions that were in effect in 1997 at the time of the petitioner's post-conviction appeal.

this document is jurisdictional. OKL.CT.CRIM. APP. R. 5.2(C)(2) (1997) (amended 1998); *Duvall v. State*, 869 P.2d 332, 333-34 (Okla.Crim.App. 1994) *cert. denied* ___ U.S. ___, 119 S.Ct. 345, 142 L.Ed.2d 284 (1998). As noted above, this jurisdictional requirement has the effect of a legislatively enacted statute. OKLA. STAT. tit. 22, § 1051(B) (1991).

Although the Oklahoma Supreme Court has a mailbox rule for the filing of petitions in error, the State legislature has not seen fit to enact a corresponding rule for the Court of Criminal Appeals of Oklahoma, nor has that court adopted such a rule. *Compare* OKLA. STAT. tit. 12, § 990A(B) (1997) with OKLA. STAT. tit. 22, § 1087 (1991). To the contrary, the legislature specifically requires that appeals in the Court of Criminal Appeals shall be filed in thirty (30) days. In contrast, the legislature permitted appeals in the Supreme Court to be filed on the date of mailing. The Court of Criminal Appeals affirmed that it does not have a mailbox rule in the case of *Hunnicutt v. State*, 952 P.2d 988, 989 (Okla.Crim.App. 1997).

However, an Oklahoma petitioner who fails to timely file an appeal of the denial of his post-conviction still has options. A petitioner can file an appeal out of time if he can demonstrate that he was denied an appeal through no fault of his own. OKL.CT.CRIM. APP. R. 2.1(E) (1997) (amended 1998); *Smith v. State*, 611 P.2d 276, 277 (Okla.Crim.App. 1980). The rules of the Court of Criminal Appeals advise petitioners of the procedure to apply for post-conviction appeals out of time. OKL.CT.CRIM. APP. R. 5.2(A) (1997) (amended 1998).

The petitioner does not claim that these procedures are inadequate. Rather, he claims that he is constitutionally entitled that the State courts be required to

establish a mailbox rule similar to that enacted in *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988). (Petition at 11-12). Specifically, he claims that the failure of the Court of Criminal Appeals to enact such a rule has resulted in a denial of his equal protection rights and his access to the Courts. (Petition at 11-12). This claim is without merit.

The *Houston* case is inapplicable to the instant case. In *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988), the Court was asked to address the applicability of the mailbox rule to FED. R. APP. P. 4. *Houston v. Lack*, 487 U.S. 266, 268, 108 S.Ct. 2379, 101 L.Ed.2d 245, 250 (1988). The Court did not hold that a mailbox rule was constitutionally required. Instead, the Court merely construed the Federal Rules of Appellate Procedure. *Houston v. Lack*, 487 U.S. 266, 274, 108 S.Ct. 2379, 101 L.Ed.2d 245, 254 (1988). The *Houston* Court also believed that the mailbox rule made good judicial policy. *Houston v. Lack*, 487 U.S. 266, 275, 108 S.Ct. 2379, 101 L.Ed.2d 245, 254 (1988). *Cf. Jenkins v. Burtzloff*, 69 F.3d 460, 461 (10th Cir. 1995) (*Houston* was not decided on constitutional or equitable basis, but is based on statutory interpretation). Absent from the *Houston* opinion is any Constitutional requirement for its decision. *Id.* Although the Supreme Court undoubtedly has the authority to interpret federal statutes and rules, absent a Constitutional basis, the Court lacks jurisdiction to require the State to adopt these same rules. U.S. CONST. art. III, § 2. In the analogous case of *Johnson v. Fankell*, 520 U.S. 911, 117 S.Ct. 1800, 138 L.Ed.2d 108, 115 (1997), the Court was asked to address whether an action in State court pursuant to 42 U.S.C. § 1983 required the State grant an

interlocutory appeal of the denial of a qualified immunity defense contrary to State law. The Court observed that had the action been brought in federal court, an interlocutory appeal on this issue could have been maintained. *Johnson v. Fankell*, 520 U.S. 911, 117 S.Ct. 1800, 138 L.Ed.2d 108, 114-15 (1997). The Court held that "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state." *Id.* The Court then held that nothing required a State to adopt federal statutory language in construing their own jurisdictional statutes. *Johnson v. Fankell*, 520 U.S. 911, 117 S.Ct. 1800, 138 L.Ed.2d 108, 115-16 (1997). The Court finally held that the state procedural rules were not pre-empted simply because the petitioner was raising a federal claim. In this regard, the Court stated:

> our normal presumption against pre-emption is buttressed by the fact that the Idaho Supreme Court's dismissal of the appeal rested squarely on a neutral state rule regarding the administration of the state courts. As we explained in Howlett v. Rose, 496 U.S. 356, 372, 110 S.Ct. 2430, 2440-2441, 110 L.Ed.2d 332 (1990):
>
> "When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. See Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1 [71 S.Ct. 1, 95 L.Ed. 3] (1950); Georgia Rail Road & Banking Co. v. Musgrove, 335 U.S. 900 [69 S.Ct. 407, 93 L.Ed. 435] (1949) (per curiam); Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945); Douglas v. New York, N.H. & H.R. Co., 279 U.S.

> 377, 49 S.Ct. 355 [73 L.Ed. 747] (1929). The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' Hart, [The Relations Between State and Federal Law], 54 Colum. L.Rev. [489, 508 (1954)]; see also Southland Corp. v. Keating, 465 U.S. 1, 33 [104 S.Ct. 852, 869-870, 79 L.Ed.2d 1] (1984) (O'CONNOR, J., dissenting); FERC v. Mississippi, 456 U.S. [742, 774, 102 S.Ct. 2126, 2145, 72 L.Ed.2d 532 (1982)] (opinion of Powell, J.) The States thus have great latitude to establish the structure and jurisdiction of their own courts."

Johnson v. Fankell, 520 U.S. 911, 117 S.Ct. 1800, 138 L.Ed.2d 108, 117 (1997). Accordingly, the fact that the petitioner has been foreclosed from having his federal habeas petition heard by his failure to comply with a state procedural rule does not implicate any Constitutional issue.

The petitioner attempts to supply the Constitutional basis for his claim by arguing that his equal protection rights and right to access to the court are denied by the absence of a mailbox rule. (Petition at 11-12). The petitioner has supplied no citations in support of this claim. Further, examination of the case law demonstrates that there is no basis for it. The fact that the State courts do not use the federal mailbox rule in no manner presents an equal protection claim. In *Vacco v. Quill*, 521 U.S. 793, 799, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997) the Court stated:

> The Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This provision creates no substantive rights. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33, 93 S.Ct. 1278, 1296-1297, 36 L.Ed.2d 16 (1973); *id.*, at 59, 93 S.Ct., at 1310 (Stewart, J., concurring). Instead, it embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982) (" '[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same' ") (quoting *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940)). If a legislative classification or distinction "neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, ___, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996).

The Oklahoma Court of Criminal Appeals rule that requires an appeal be filed within thirty (30) days applies to all applications for post-conviction relief. It accordingly does not discriminate against prisoners. Further, prisoners are not a suspect class. *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997). *Cf. Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41, 105 S.Ct. 3249, 87 L.Ed.2d 313, 320-21 (1985) (listing suspect classes). Therefore, the petitioner's equal protection claim must establish that the Oklahoma rule "burdens a fundamental right." *Romer v. Evans*, 517 U.S. 620, ___, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855, 865 (1996). However, a post-conviction appeal is not constitutionally required. *Cf. United*

States v. MacCollom, 426 U.S. 317, 323, 96 S.Ct. 2086, 48 L.Ed.2d 666, 674 (1976) (Due Process clause does not require right to collateral review); *Coleman v. Thompson*, 501 U.S. 722, 755, 111 S.Ct. 2546, 115 L.Ed.2d 640, 672 (1991). *See generally Evitts v. Lucey*, 469 U.S. 387, 393, 105 S.Ct. 830, 83 L.Ed.2d 821, 827 (1985). As the petitioner is not being discriminated against because of his membership in a suspect class, and if his fundamental rights are unaffected, he cannot support an equal protection claim. *Romer v. Evans*, 517 U.S. 620, ___, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855, 865 (1996).

Further, the Oklahoma court rules are not unduly burdensome. If a petitioner can demonstrate that he was denied an appeal through no fault of his own, he may be granted an appeal out of time. *Smith v. State*, 611 P.2d 276, 277 (Okla.Crim.App. 1980). The Oklahoma statute therefore does not burden a fundamental right. To the contrary, it protects a petitioner's right to access to the court to a greater degree than the mailbox rule, as it allows a petitioner access to the court no matter how late his petition is filed, contingent only on his demonstrating that the delay was not his fault. *Banks v. State*, 953 P.2d 344, 346 (Okla.Crim.App. 1998).

As the Court rule neither burdens a fundamental right or affects a suspect class, it only needs to have a rational relationship to a legitimate end. *Romer v. Evans*, 517 U.S. 620, ___, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855, 865 (1996). The Court has previously noted the "important interest in finality served by state procedural rules." *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640, 669 (1991). In the instant case, the restrictions on time to file a post-conviction appeal are based on

finality. *Cf. Bryan v. State*, 948 P.2d 1230, 1234 (Okla.Crim.App. 1997) (procedural bars in capital post-conviction statute are for the purpose of establishing finality). This is a legitimate objective. *McCleskey v. Zant*, 499 U.S. 467, 491-93, 111 S.Ct. 1454, 113 L.Ed.2d 517, 542-44 (1991). Accordingly, it is constitutionally permissible. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640, 669 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

In *Logan v. Zimmermann Brush Company*, 455 U.S. 422, 437, 102 S.Ct. 1048, 71 L.Ed.2d 265, 279 (1981) the Court stated:

> Obviously, nothing we have said entitles every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, *cf. Chase Securities Corp. v. Donaldson*, 325 U.S., at 314-316, 65 S.Ct., at 1142-1143, or, in an appropriate case, filing fees. *United States v. Kras*, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973). And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. *Hammond Packing Co. v. Arkansas*, 212 U.S., at 351, 29 S.Ct., at 380; *Windsor v. McVeigh*, 93 U.S., at 278. What the Fourteenth Amendment does require, however, "is 'an opportunity . . . granted at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case,' *Mullane v. Central Hanover Tr. Co.*, supra, 339 U.S., at 313, 70 S.Ct., at 656."

Boddie v. Connecticut, 401 U.S., at 378, 91 S.Ct., at 786.

The time limits imposed by the Oklahoma Court rules help to ensure the timely and final disposition of cases. They are therefore rationally related to the objective of achieving finality. The petitioner's equal protection claim fails.

Likewise, the petitioner's access to the Oklahoma court was not denied by the thirty day filing rule. "The right of access to the courts is neither absolute nor unconditional, . . . " *In re Winslow*, 17 F.3d 314, 315 (10th Cir. 1994). What the Fourteenth Amendment does require, however, is that the petitioner be given "an opportunity . . . granted at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66 (1965). In the instant case, the petitioner does not claim that he was not afforded such an opportunity. He does not contest the adequacy of the thirty day limit. Nor has he ever filed an application for appeal out of time in the State court to show that he was somehow not able to comply with the thirty day limit through no fault of his own.[4] The petitioner was accordingly given an opportunity to present his claim. His failure to properly follow State procedure has resulted in his being barred.

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[4] The petitioner did file a "Petition for Rehearing" in which he argued he was unable to comply with the thirty day limit. However, a "Petition for Rehearing" is not allowed in Post-Conviction appeals. OKL.CT.CRIM. APP. R. 5.4 (1997) (renumbered to Rule 5.5 in 1998).

As noted earlier, Supreme Court Rule 10 states that the Court will grant certiorari if there is a split among United States courts of appeals, or if its decision is "so far departed from the accepted . . . course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." SUP.CT.R. 10(a). The petitioner has neither identified a split among circuit courts, nor has he identified how the Tenth Circuit's decision has departed from the accepted course of judicial proceedings. He can therefore not rely on this section as a basis for asking for a petition of certiorari. Likewise, as the Court of Criminal Appeals' lack of a mailbox rule is based on State law and does not involve federal or constitutional law, he cannot rely on Rule 10(b). SUP.CT.R. 10(b). Likewise, he cannot rely on Rule 10(c) because he does not raise a question of "federal law" SUP.CT.R. 10(c). His petition should accordingly be denied.

The petitioner also attempts to argue that the lack of an "up to date" law library prejudiced him in filing an appeal within the thirty day limit. (Petition at 8). Although not necessary for disposing of the instant claim, the undersigned counsel merely notes that the petitioner's affidavit describing the holdings of the law library is incomplete. As the attached affidavit demonstrates, the law library is reasonably current and includes copies of the Oklahoma Court Rules. (Respondent's Appendix at 8A). Further, the respondent notes that this claim was not raised in the federal circuit court, nor has he presented this claim to the State courts. He accordingly cannot rely on this ground to show that the United States Court of Appeals' decision was in error on this

point. *Cf.* SUP.CT.R. 10. Finally, the petitioner has presented no argument as to how the alleged deficiencies prevented his timely filing. The petitioner does not claim that the Court rules were unavailable and an examination of the affidavit signed by the library custodian shows that the Court rules are available. Therefore, the petitioner cannot claim that he lacked notice of the thirty day requirement. His claim accordingly fails.

CONCLUSION

The petitioner has failed to demonstrate any entitlement to a petition for writ of certiorari. The rule of *Houston v. Lack* is based on the interpretation of a federal statute and has no applicability to State court rules. The petitioner's continued failure to avail himself of the remedies offered by the State rules and request an appeal out of time has resulted in his post-conviction appeal from not being considered. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

United States Constitution, Article III, § 2

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; – to all cases affecting ambassadors, other public ministers and consuls; – to all cases of admiralty and maritime jurisdiction; – to controversies to which the United States shall be a party; – to controversies between two or more states; – between a state and citizens of another state; – between citizens of different states; – between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

OKL. CONST. art. VII, § 1.

§ 1 Courts in Which Judicial Power Vested.

The judicial power of this State shall be vested in Senate, sitting as a Court of Impeachment, a Supreme Court, the Court of Criminal Appeals, the Court on the Judiciary, the State Industrial Court, the Court of Bank Review, the Court of Tax Review, and such intermediate appellate courts as may be provided by statute District Courts, and such Boards, Agencies and Commissions created by the Constitution or established by statute as exercise adjudicative authority or render decisions in individual proceedings. Provided that the Court of Criminal Appeals, the State Industrial Court, the Court of Bank Review and the Court of Tax Review and such Boards, Agencies and Commissions as have been established by statute shall continue in effect, subject to the power of the Legislature to change or abolish said Courts, Boards, Agencies, or Commissions. Municipal Courts in cities or incorporated towns shall continue in effect and shall be subject to creation, abolition or alteration by the Legislature by general laws, but shall be limited in jurisdiction to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns or of duly adopted regulations authorized by such ordinances.

OKL. CONST. art. VII, § 4

§ 4. Jurisdiction of Supreme Court – Writs.

The appellate jurisdiction of the Supreme Court shall be co-extensive with the State and shall extend to all cases at law and in equity; except that the Court of Criminal

Appeals shall have exclusive appellate jurisdiction in criminal cases until otherwise provided by statute and in the event there is any conflict as to jurisdiction, the Supreme Court shall determine which court has jurisdiction and such determination shall be final. The original jurisdiction of the Supreme Court shall extend to a general superintendent control over all inferior courts and all Agencies, Commissions and Boards created by law. The Supreme Court, Court of Criminal Appeals, in criminal matters and all other appellate courts shall have power to issue, hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law and may exercise such other and further jurisdiction as may be conferred by statute. Each of the Justices or Judges shall have power to issue writs of habeas corpus to any part of the State upon petition by or on behalf of any person held in actual custody and make such writs returnable before himself, or before the Supreme Court, other Appellate Courts, or before any District Court, or judge thereof in the State. The appellate and the original jurisdiction of the Supreme Court and all other appellate courts shall be invoked in the manner provided by law.

Rules of the Oklahoma Supreme Court, 1997

Rule 1.1(B)

(b) Scope and Effective Date These rules govern proceedings in the Oklahoma Supreme Court and in the Oklahoma Court of Civil Appeals. These rules also have application to certain proceedings in lower tribunals

which are incident to appeal or review from decisions of such tribunals.

Rules of the Oklahoma Court of Criminal Appeals, 1997

Rule 1.0 Scope of Rules

A. The Rules of the Court of Criminal Appeals shall apply to all appeals and proceedings in this Court. See Section 1051 of Title 22.

B. The Rules set forth in Sections I, II and III shall apply in all types of appeals, unless a specific provision to the contrary appears in the Sections governing specific appeals.

C. All references to statutes are to Oklahoma Statutes unless otherwise noted.

Rule 5.2(A) (1997)

A. Final Judgment on Post-conviction Application

The appeal to the Court under the Post-Conviction Procedure Act constitutes an appeal from the issues raised, the record, and findings of fact and conclusions of law made in the district court in non-capital cases. *See Yingst v. State*, 480 P.2d 276, 277 (Okla.Crim.App.1971). For appeal out of time see Rule 2.1(E).

Rule 5.2(C) (1997)

(1) The party desiring to appeal from the final order of the district court under Section V of these rules and Section IX, must file a petition in error and supporting brief, WITH A CERTIFIED COPY OF THE ORDER ATTACHED with the Clerk of this Court. If the post conviction appeal arises from a misdemeanor or regular felony conviction, the required documents must be filed within thirty (30) days from the date of the final order of the district court. If post conviction appeal is from a capital conviction, the documents must be filed within the time set in Section 1089 of Title 22. The brief shall not exceed thirty (30) typewritten 8½ by 11-inch pages in length. *See* Section IX for page limits in capital cases.

(2) This Court may then direct the other party to file an answer brief, if necessary. Failure to file a petition in error, with a brief, within the time provided, shall constitute a procedural bar for this Court to consider the appeal.

Oklahoma Statutes, 12 O.S.Supp.1997, § 990A(B)

§ 990A. Appeal to Supreme Court of Oklahoma – Filing of Petition – Rules – Procedure – Dismissal.

B. The filing of the petition in error may be accomplished either by delivery or by certified mail with return receipt requested to the Clerk of the Supreme Court. The date of filing or the date of mailing, as shown by the postmark affixed by the post office or other proof from

the post office of the date of mailing, shall constitute the date of filing of the petition in error. If there is no proof from the post office of the date of mailing, the date of receipt by the Clerk of the Supreme Court shall constitute the date of filing of the petition in error.

22 O.S.1991, § 1051(B)

§ 1051(B) Right of Appeal-Review-Corrective Jurisdiction-Procedure-Scope of Review on Certiorari

(b) The procedure for the filing of an appeal in the Court of Criminal Appeals shall be as provided in the Rules of the Court of Criminal Appeals; and the Court of Criminal Appeals shall provide by court rules, which will have the force of statute, and be in furtherance of this method of appeal: (1) The procedure to be followed by the trial courts in the preparation and authentication of transcripts and records in cases appealed under this act; (2) the procedure to be followed for the completion and submission of the appeal taken hereunder; and (3) the procedure to be followed for filing a petition for and the issuance of a writ of certiorari.

22 O.S.1991, § 1087

§ 1087. Appeal to Court of Criminal Appeals

A final judgment entered under this act may be appealed to the Court of Criminal Appeals on petition in error filed either by the applicant or the state within thirty (30) days from the entry of the judgment. Upon motion of either party on filing of notice of intent to appeal, within ten (10) days of entering the judgment, the district court may stay the execution of the judgment pending disposition

on appeal; provided, the Court of Criminal Appeals may direct the vacation of the order staying the execution prior to final disposition of the appeal.

SWORN AFFIDAVIT

STATE OF OKLAHOMA)
) ss
COUNTY OF CLEVELAND)

I, Sandra Dorris of Joseph Harp Correctional Center, Lexington, Oklahoma, being of lawful age, and having been duly sworn upon my oath, hereby depose and say that:

I am the Law Library Supervisor at Joseph Harp Correctional Center and have been since June of 1995. We are currently receiving shipments of books from West Publishing Company via the Legal Division of the Oklahoma Department of Corrections, on a monthly basis. Prior to this, books were received periodically directly from the publishing company. For cases in books that we do not have for various reason, we can access them by faxing a request to Legal Division. In turn, they will fax or mail the case to us. At this time we have the following volumes on our shelves: Pacific Reporters: Vols. 7-10, 15-22, 27-28, 31-32, 37-38, 51-58, 60-282, & 284-299.

Oklahoma Decisions: 605 P.2d thru 675 P.2d, & 683 P.2d thru 975 P.2d Federal Reporters: 615 thru 999, and One thru 191#1 F 3d pages 1-462. F. Supp. Vols. 481 thru 999 and One F. Supp. 2d thru 60#1 pages 1-1381. United Supreme Court: Vols. 95 L Ed thru 100 L Ed and one

L. Ed. 2d thru 125 L. Ed. 2d. And 110A S Ct. thru 120#1 pages 1-319. Have current Oklahoma Court Rules.

s/ Sandra Dorris
Signature of Affiant

Joseph Harp Correctional Center
Lexington, Oklahoma 73051

The above affidavit was sworn to and subscribed before me this 30th day of November, 1999.

SEAL

My Commission Expires: 4-3-2000

/s/ Sylvia Johnson
Notary Public